

Transitional Justice in Colombia Under Attack: An Interview with GABRIEL ROJAS

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Colombia is the first country in the world with a peace agreement that includes the Rome Statute obligations of the International Criminal Court in its new transitional justice system. But after a change of government last year, the Special Jurisdiction for Peace (SJP) is already coming under attack before it has barely started.

The SJP was developed as part of the peace negotiations between the Colombian Government under then-President Santos and the FARC that culminated in the 2016 Peace Agreement. It is therefore designed as an incentive for the guerrilla to lay down their arms but also to tell the whole truth about their crimes. The incentive is that if an ex-guerrilla or military member tells the whole truth about the war crimes or grave human rights violations they have committed during the conflict, they do not face imprisonment but have to do restorative measures instead.

The armed conflict in Colombia began in the mid 1960ies with paramilitary groups, crime cartels, far-left guerrilla such as FARC and the military forces involved and has resulted [in 220,000 deaths, 81% of those civilians](#).

The SJP is part of what is called the “Comprehensive System for Truth, Justice, Reparation and Non-repetition” that also entails a Truth Commission tasked with writing a comprehensive report about the conflict and a search unit to find the tens of thousands of persons who have disappeared during the conflict.

So far, there are five open cases at the SJP. The first one deals with kidnappings, a tactic that FARC in particular used. Another one concerns the so-called *falsos positivos* where poor people were killed and falsely presented as guerrilla members by military forces. There are also three more cases related to specific regions in the periphery that were especially affected by the conflict.

I had the pleasure of talking to Gabriel Rojas, Criminal Justice Coordinator for Colombia at the International Centre for Transitional Justice (ICTJ), a NGO that advised the different stakeholders in the peace negotiations and now in the implementation process.

CD: How does the process at the SJP work?

GR: The idea is that civil society organisations, the attorney general's office, and other authorities of the state give information to one of the chambers of the SJP. They then put together all that information and create macro-cases. As soon as the Chamber of Acknowledgment of the SJP opens a case, they give the reports

to those mentioned to have done some kind of criminal activity related to serious crimes

Those mentioned in the reports are asked to come before the Acknowledgment Chamber and make voluntary accounts about their alleged responsibility in serious crimes. If they do that, there is a public hearing, with the victims included, in which the allegedly responsible acknowledges his crimes and presents a project of restorative sanctions which has to be accepted by the victims and the community in the territory. In restorative theory, the participation of victims, community and perpetrator is the axis of the whole system.

That is also why telling the truth is so important. Not only what is in the records or reports, but whatever the person knows about the criminal structure that planned the crime. That is what victims want to know: what happened, and why did it happen?

Now, if you're mentioned in one of the reports and you do not accept what is mentioned there, there is a Prosecutor Office within the SJP (Accusation Unit). That unit starts, like any prosecutor, to make an investigation and make an accusation before the tribunal. In this case, that's an adversarial and confrontational process which is traditional criminal law.

A person can still confess in the middle of the trial, according to the logic of attaining the most truth. But they already lost the benefit of a restorative sanction so they get a prison sentence of 5-8 years. If, however, the trial goes along and they are found guilty, they go to prison for 15-20 years. But they could be found not guilty as well. They have all the guarantees of due process. Many military are trying that, not to confess and to win the trial.

CD: If they tell the whole truth from the beginning, what kind of sanctions can they expect?

GR: What they're trying to do is relate these restorative sanctions to the structural points of the Peace Agreement. The idea of the so-called guarantee of non-repetition is not to make the sanction a retributive one for the sake of damaging those who damaged other people. Rather, the sanction shall serve to overcome the structural causes of the conflict and at the same time it shall re-build the social fabric of these communities.

For example, point 1 of the Peace Agreement refers to law reform in order to overcome inequality and to include peasants within the central economy of Colombia. Point 2 deals with political participation. And point 4 of the Agreement concerns the problem of drug trafficking.

The idea is that the restorative sanctions are related to that. Somebody who gets sanctioned after telling all the truth might be sent to one of the areas where the conflict was really hard and where the first point, the rural reform, is being implemented through development plans. Alternatively, this could refer to infrastructure or to building a culture of human rights or to eradicate minefields. They might be building a school for 5-8 years while they do some other community work.

There are still no sanctions because the process is just beginning. But maybe by the end of this year we might have some cases presented before the tribunal and by 2020 some people might be going to the regions most affected by the conflict to fulfil their sentence.

CD: Ten members of FARC now sit in Congress, five in each chamber. What happens if they are sentenced by the SJP, how does it align with their public office?

GR: The Constitutional Court said that the SJP must determine if the sanction is compatible with their political exercise. If they cannot perform the sanction while they are in office they might have to miss their seat. Anyway, it's a case by case consideration and we are not yet in that procedural stage.

CD: And the party could replace that person?

GR: Yes. Generally, if someone loses their seat because of a criminal action, the party in general lost its seat. But in this case, they were not elected, they were selected by FARC as part of the Peace Agreement. It was really controversial. But at the same time, that's part of what you have to do in order to end the war. To give them political participation in order to stop the violence. In any case, as I said before, is a case by case consideration. We will have to see how the SJP deals with each case once the sentences are dictated.

CD: How does the SJP decide which cases to hear?

It is not a case by case design but a macro-criminal design that was learned from the shortcomings of the Justice and Peace law. The three main criteria to be selected as a case are the gravity of the crimes, the kind of damage they did to communities and the representativity of those crimes. As a complementary criterion, they take the possibility to indict those that were mentioned in the report, which often means the availability of sufficient information.

CD: The Justice and Peace law was adopted in 2005 to demobilise the paramilitary. What were its shortcomings?

GR: In the first proposal of President Uribe, it was a law only to give amnesties to the paramilitary groups. Then, the Congress added 8 years of jail. But it was a transactional law. If you gave up your arms, you'd go jail for eight years and that's it. No truth demanded, and no means of reparation demanded.

Truth wasn't the main objective at the beginning of the Justice and Peace Law. It was hindered by the fact that the superiors of the paramilitary groups had to accept all the charges to get the benefits of the law, which was an alternative jail sentence in exchange for acknowledging responsibility about everything that they and their subordinates did. In the end, in many cases, they said yes to everything.

But the main problem with that law was that, in the beginning, each case was being brought individually. And that was impossible in terms of resources and time. If they had continued like that, it would have taken them until the next century to finish. The

new system learnt from that experience. That is why they included the idea of having macro-cases.

CD: The ICC Deputy Prosecutor James Stewart said in a speech recently that the criteria applied by the SJP are narrower than what the ICC uses.

GR: He came to explain the principle of complementarity which refers to the idea that the Rome Statute and the states that sign it are obliged to investigate, judge and punish serious crimes. But the ICC only takes over if they are unwilling or unable to judge those crimes, not before.

He said that Colombia is fulfilling its obligation by implementing the SJP, being the first country to have a peace agreement acknowledging the Rome Statute and applying it with a local tribunal. Then he went on to say that they are concerned, though, because the Democratic Centre Party, which is the party of the new President Duque, is trying to include changes in the Agreement that could result in impunity.

The ICC already has an open preliminary observation on the Colombia situation, particularly referring to the so-called *falsos positivos* (murders of poor people that were falsely presented as guerrilla members), amongst other crimes committed since 2009 in the country. The Deputy Prosecutor said that if the government changes the way the SJP is structured it will delay the investigation of crimes committed by the armed forces. That might mean that the principle of complementarity applies and the ICC could prosecute members of the military forces in Colombia.

CD: What is the new government trying to do?

GR: At the beginning, the Democratic Centre Party, together with another party called *Cambio Radical*, wanted to have a new chamber solely devoted to the armed forces. Obviously, that is completely against the logic of the system because there is no balance: If you open a new chamber you are giving benefits to the military. The idea is that they receive the exact same treatment as the guerrilla members. Also, it would be a redundant chamber because there is already a chamber in the SJP in charge of those indicted or sentenced by the ordinary law that are members of the military forces.

According to the Democratic Centre, what they are trying to do is to include more legitimate judges. They have always said, since the plebiscite back in 2016, that the judges selected for the SJP are biased towards the guerrilla. Which is not true. The International Center for Transitional Justice, the NGO I work for, was part of the selection committee. And the selection committee was created with the highest standards, objective indicators and with international experts that decided on the 38 members. That's just a way of the Democratic Centre to delegitimise the SJP. What they want is military or former militaries becoming SJP judges.

Cambio Radical and Democratic Centre lost the first attempt of introducing a new chamber. Then they suggested to include 14 new magistrates that supposedly

know more about operational law of the armed forces. Which is completely obscure, nobody knows what operational law means. It is not a branch of law at all. And the only ones that know about it are the military.

But they also failed with this one. Which doesn't mean that they're not going to try again. They lost within the previous legislative period. But in the next one, starting in March, they are going to come up with something new.

CD: What role does the Constitution play in this?

GR: The parties who negotiated the Peace Agreement in Cuba, including then-President Santos, were very clever in making the Peace Agreement transitorily part of the Colombian Constitution. Any changes must pass a constitutional reform which means 8 debates within the two chambers of Congress. Furthermore, any law that tries to change the Constitution has to be revised by the Constitutional Court and cannot be accepted if it structurally changes it. So even if a law passes in Congress it might hold when it is subject to constitutional revision.

CD: What is most needed to make the SJP withstand and work?

GR: We cannot think that because the Peace Agreement was beautifully designed the peace process is already finished. The structural points of the Agreement have to be implemented and there's this huge threat, financially and politically, that the new government does not want that or only wants to do it in the most superficial way. But there is still hope. We're seeing that the constitutional design is strong and holding up against the attacks.

Another point is that Colombian citizens in general need to commit to this transition. There is still a lot of polarisation. We also need the support of the international community because there is a lot put into this. European countries helped to craft this design and now they have to push the new president to fulfil the commitment. And the last thing is: the SJP will only exist for fifteen years. At the end, what we need is a strong rule of law in Colombia and this is just the transition in order to get there. Then the ordinary justice system and institutions have to work in Colombia. That's the way for Colombians not to continue killing each other because of their political standpoints or their profound differences in wealth. That's been one of our main problems, not only for 53 years of armed conflict, but throughout our entire republican history. So, there's hope, but there's a lot of work and we continue to try.

